

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Nov 03, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PERRY C. B.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 1:22-CV-3161-RMP

ORDER DENYING JUDGMENT TO
PLAINTIFF AND GRANTING
JUDGMENT IN FAVOR OF THE
COMMISSIONER

BEFORE THE COURT, without oral argument, are briefs from Plaintiff Perry C. B.¹, ECF No. 9, and Defendant the Commissioner of Social Security (the “Commissioner”), ECF No. 11. Plaintiff seeks judicial review, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), of the Commissioner’s denial of his claim for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (the “Act”). *See* ECF No. 9 at 2.

¹ In the interest of protecting Plaintiff’s privacy, the Court uses Plaintiff’s first name and middle and last initials.

1 Having considered the parties' briefs, ECF Nos. 9 and 11; Plaintiff's reply,
2 ECF No. 13; the administrative record, and the applicable law, the Court is fully
3 informed. For the reasons set forth below, the Court denies judgment for Plaintiff
4 and directs entry of judgment in favor of the Commissioner.

5 **BACKGROUND**

6 ***General Context***

7 Plaintiff protectively filed for DIB on approximately March 9, 2020, alleging
8 an onset date of March 30, 2018. *See* Administrative Record ("AR") 16, 86.
9 Plaintiff was 51 years old on the alleged disability onset date and asserted that he
10 was unable to work due to heart issues with a history of heart attacks; centralized
11 sleep apnea; hypertension; depression; unexplained fatigue; lower back pain; vision
12 issues; bilateral hearing loss; tinnitus; and centralized sleep apnea. AR 86–87.
13 Plaintiff alleged that he stopped working prior to March 30, 2018, because of his
14 conditions. AR 87. Plaintiff's application was denied initially and upon
15 reconsideration, and Plaintiff requested a hearing. *See* AR 139–41, 146–47.

16 On July 13, 2021, Plaintiff appeared by telephone, represented by his attorney
17 Kathryn Higgs, at a hearing held by Administrative Law Judge ("ALJ") Linda Harris
18 Crovella from Richmond, Virginia. AR 47–85. The ALJ heard from Plaintiff as
19 well as vocational expert ("VE") Robert Jackson. AR 49–84. ALJ Crovella issued
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1 an unfavorable decision on August 4, 2021, and the Appeals Council denied review.
2 AR 1–6, 16–28.

3 ***ALJ’s Decision***

4 Applying the five-step evaluation process, ALJ Crovella found:

5 **Step one:** Plaintiff meets the insured status requirements of the Act through
6 December 31, 2023. AR 18. Plaintiff did not engage in substantial gainful activity
7 since his alleged onset date of March 30, 2018. AR 18 (citing 20 C.F.R. § 404.1571
8 *et seq*).

9 **Step two:** Plaintiff has the following severe impairments that are medically
10 determinable and significantly limit his ability to perform basic work activities:
11 acute myocardial infarction, coronary artery disease, and obesity, pursuant to 20
12 C.F.R. §§ 404.1520(c). AR 18. The ALJ memorialized that she considered whether
13 the record supported finding other impairments referred to in Plaintiff’s record in be
14 severe, including: degenerative disc disease, history of deep venous thrombosis with
15 deep venous reflux, hyperlipidemia, obstructive sleep apnea, vision impairment,
16 hearing loss (not treated with cochlear implant), hypertension, asthma, and seasonal
17 allergies. AR 19. With respect to Plaintiff’s mental impairments, the ALJ
18 considered the “paragraph B” criteria and found that Plaintiff has only a mild
19 functional limitation in: understanding, remembering, or applying information;
20 interacting with others; concentrating, persisting, or maintaining pace; and adapting
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1 or managing oneself. AR 19–20. The ALJ found: “Because the claimant’s
2 medically determinable mental impairments cause no more than ‘mild’ limitation in
3 any of the functional areas and the evidence does not otherwise indicate that there is
4 more than a minimal limitation in the claimant’s ability to do basic work activities,
5 they are nonsevere.” AR 20 (citing 20 C.F.R. § 404.1520a(d)(1)). The ALJ
6 expressed that she “considered all of the claimant’s medically determinable
7 impairments, including those that are not severe, when assessing Plaintiff’s residual
8 functional capacity. AR 20.

9 **Step three:** The ALJ concluded that Plaintiff does not have an impairment or
10 combination of impairments that met or medically equaled the severity of one of the
11 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 20 (citing 20
12 C.F.R. §§ 404.1520(d), 404.1525, and 404.1526). The ALJ memorialized that
13 Plaintiff’s cardiac impairments do not meet listings 4.02 or 4.04. AR 20–21. The
14 ALJ further recorded that she evaluated obesity pursuant to Social Security Ruling
15 (“SSR”) 19-2p and determined that, “[b]ased on the medical evidence of record, . . .
16 obesity does not equal a listing, alone or in combination with another impairment.”
17 AR 21. The ALJ further found that “no treating or examining physician has
18 mentioned findings equivalent in severity to the criteria of any listed impairment.”
19 AR 21.

1 **Residual Functional Capacity (“RFC”):** The ALJ found that Plaintiff has
2 the RFC to perform light work as defined in 20 C.F.R. § 404.1567(b), with the
3 following exceptions: he can frequently climb ramps or stairs and stoop, kneel,
4 crouch, and crawl; he can never climb ladders, ropes, or scaffolds; he must avoid
5 concentrated exposure to extreme heat, loud noise, and hazards. AR 21.

6 In determining Plaintiff’s RFC, the ALJ found that Plaintiff’s “medically
7 determinable impairments could reasonably be expected to cause the alleged
8 symptoms; however, the claimant’s statements concerning the intensity, persistence
9 and limiting effects of these symptoms are not entirely consistent with the medical
10 evidence and other evidence in the record for the reasons explained in this decision.”
11 AR 22.

12 **Step four:** The ALJ found that Plaintiff is unable to perform any past relevant
13 work. AR 26 (citing 20 C.F.R. § 404.1565).

14 **Step five:** The ALJ found that Plaintiff has at least a high school education;
15 was 51 years old, which is defined as an individual closely approaching advanced
16 age, on the alleged disability onset date; and that transferability of job skills is not
17 material to the determination of disability because Plaintiff is “not disabled” under
18 the Medical-Vocational Rules, whether Plaintiff has transferable job skills. AR 27
19 (citing 20 C.F.R. §§ 404.1563 and 404.1564; SSR 82-41; 20 C.F.R. pt. 404, subpt. P,
20 app’x 2). The ALJ found that given Plaintiff’s age, education, work experience, and
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1 RFC, Plaintiff can make a successful adjustment to other work that exists in
2 significant numbers in the national economy. AR 26–27. Specifically, the ALJ
3 recounted that the VE identified the following representative occupations that
4 Plaintiff could perform with the RFC: cashier (light, unskilled, with around 570,000
5 jobs nationally) and marker (light, unskilled work, with around 129,000 jobs
6 nationally). AR 28. The ALJ concluded that Plaintiff has not been disabled within
7 the meaning of the Act from the alleged onset date of March 30, 2018, through the
8 date of the decision. AR 28.

9 Plaintiff sought review of the ALJ’s decision in this Court. ECF No. 1.

10 LEGAL STANDARD

11 *Standard of Review*

12 Congress has provided a limited scope of judicial review of the
13 Commissioner’s decision. 42 U.S.C. § 405(g). A court may set aside the
14 Commissioner’s denial of benefits only if the ALJ’s determination was based on
15 legal error or not supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d
16 993, 995 (9th Cir. 1985) (citing 42 U.S.C. § 405(g)). “The [Commissioner’s]
17 determination that a claimant is not disabled will be upheld if the findings of fact are
18 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.
19 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere
20 scintilla, but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112,
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1 1119 n.10 (9th Cir. 1975); *McCallister v. Sullivan*, 888 F.2d 599, 601–02 (9th Cir.
2 1989). Substantial evidence “means such evidence as a reasonable mind might
3 accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389,
4 401 (1971) (citations omitted). “[S]uch inferences and conclusions as the
5 [Commissioner] may reasonably draw from the evidence” also will be upheld. *Mark*
6 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the
7 record, not just the evidence supporting the decisions of the Commissioner.
8 *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989).

9 A decision supported by substantial evidence still will be set aside if the
10 proper legal standards were not applied in weighing the evidence and making a
11 decision. *Browner v. Sec’y of Health and Human Servs.*, 839 F.2d 432, 433 (9th Cir.
12 1988). Thus, if there is substantial evidence to support the administrative findings,
13 or if there is conflicting evidence that will support a finding of either disability or
14 nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*,
15 812 F.2d 1226, 1229–30 (9th Cir. 1987).

16 ***Definition of Disability***

17 The Social Security Act defines “disability” as the “inability to engage in any
18 substantial gainful activity by reason of any medically determinable physical or
19 mental impairment which can be expected to result in death, or which has lasted or
20 can be expected to last for a continuous period of not less than 12 months.” 42

1 U.S.C. § 423(d)(1)(A). The Act also provides that a claimant shall be determined to
2 be under a disability only if the impairments are of such severity that the claimant is
3 not only unable to do their previous work, but cannot, considering the claimant's
4 age, education, and work experiences, engage in any other substantial gainful work
5 which exists in the national economy. 42 U.S.C. § 423(d)(2)(A). Thus, the
6 definition of disability consists of both medical and vocational components. *Edlund*
7 *v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

8 ***Sequential Evaluation Process***

9 The Commissioner has established a five-step sequential evaluation process
10 for determining whether a claimant is disabled. 20 C.F.R. § 404.1520. Step one
11 determines if they are engaged in substantial gainful activities. If the claimant is
12 engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §
13 404.1520(a)(4)(i).

14 If the claimant is not engaged in substantial gainful activities, the decision
15 maker proceeds to step two and determines whether the claimant has a medically
16 severe impairment or combination of impairments. 20 C.F.R. § 404.1520(a)(4)(ii).
17 If the claimant does not have a severe impairment or combination of impairments,
18 the disability claim is denied.

19 If the impairment is severe, the evaluation proceeds to the third step, which
20 compares the claimant's impairment with listed impairments acknowledged by the
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1 Commissioner to be so severe as to preclude any gainful activity. 20 C.F.R. §
2 404.1520(a)(4)(iii); *see also* 20 C.F.R. § 404, Subpt. P, App. 1. If the impairment
3 meets or equals one of the listed impairments, the claimant is conclusively presumed
4 to be disabled.

5 If the impairment is not one conclusively presumed to be disabling, the
6 evaluation proceeds to the fourth step, which determines whether the impairment
7 prevents the claimant from performing work that they have performed in the past. If
8 the claimant can perform their previous work, the claimant is not disabled. 20
9 C.F.R. § 404.1520(a)(4)(iv). At this step, the claimant's RFC assessment is
10 considered.

11 If the claimant cannot perform this work, the fifth and final step in the process
12 determines whether the claimant is able to perform other work in the national
13 economy considering their residual functional capacity and age, education, and past
14 work experience. 20 C.F.R. § 404.1520(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137,
15 142 (1987).

16 The initial burden of proof rests upon the claimant to establish a prima facie
17 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
18 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
19 is met once the claimant establishes that a physical or mental impairment prevents
20 them from engaging in their previous occupation. *Meanel*, 172 F.3d at 1113. The
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1 burden then shifts, at step five, to the Commissioner to show that (1) the claimant
2 can perform other substantial gainful activity, and (2) a “significant number of jobs
3 exist in the national economy” which the claimant can perform. *Kail v. Heckler*, 722
4 F.2d 1496, 1498 (9th Cir. 1984).

5 ISSUES ON APPEAL

6 Plaintiff’s brief raises the following issues regarding the ALJ’s decision:

- 7 1. Did the ALJ erroneously fail to include Plaintiff’s mental health and
8 hearing loss as severe impairments at step two?
- 9 2. Did the ALJ erroneously discount Plaintiff’s subjective symptom
10 statements?
- 11 3. Did the ALJ err in her evaluation of Plaintiff’s medical source
12 opinions?
- 13 4. Did the ALJ err in formulating Plaintiff’s RFC, resulting in harmful
14 error at step five?

13 *Step Two*

14 Plaintiff argues that ALJ Crovella should have found that Plaintiff’s hearing
15 loss and mental health issues seriously limit his ability to conduct basic work
16 activities. ECF No. 9 at 6–7. With respect to hearing loss, Plaintiff argues that
17 audiograms in Plaintiff’s record “support that [Plaintiff] experiences mild bilateral
18 hearing loss, which would certainly impact his ability to communicate over the
19 phone or communicate in noisy surroundings.” *Id.* at 7. With respect to Plaintiff’s
20 mental health issues, Plaintiff argues that “the ALJ mischaracterizes the evidence in
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1 the medical records, and disregards all relevant information in a chart note and
2 focuses instead on the one piece of evidence that would support a mild finding. This
3 level of cherry-picking through evidence has routinely been admonished.” *Id.*
4 (citing *Renee N. v. Kijakazi*, No. 6:20-cv-01131-SB, 2021 U.S. Dist. LEXIS 192017
5 (D. Or. Oct. 5, 2021); *Thompson v. Comm’r of Soc. Sec.*, No. 2:20-cv-3-KJN, 2021
6 U.S. Dist. LEXIS 90929, 2021 WL 1907488, at *7 (E. D. Cal. May 12, 2021);
7 *Buethe v. Comm’r of Soc. Sec.*, No. 2:20-cv-552-KHN, 2021 U.S. Dist. LEXIS
8 93526, 2021 WL 1966202, at *6 (E.D. Cal. May 17, 2021)). Plaintiff especially
9 faults the ALJ for finding that Plaintiff is only mildly impaired in his ability to
10 interact with others. *See id.* at 8. Plaintiff notes that the ALJ reasoned that Plaintiff
11 regularly speaks with his parents, enjoys spending time with his girlfriend, and is a
12 member of “several social clubs[,] but Plaintiff asserts that substantial evidence does
13 not support that he still belongs to social clubs or that he gets along with his
14 girlfriend or family members. *See id.* at 8–9 (citing AR 267, 451, 462, 464, and 468
15 for the proposition that Plaintiff mostly stays indoors, although he used to enjoy
16 outdoor activities, and is moody and irritable, to the detriment of his relationships).
17 Plaintiff adds that the ALJ does not explain how Plaintiff’s daily activities are
18 inconsistent with the limitations that Plaintiff describes. *Id.* at 10.

19 The Commissioner responds that Plaintiff does not satisfy his burden of
20 showing that mild hearing loss caused more than minimal limitation in his
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1 functioning, and the ALJ relied on substantial evidence in finding that Plaintiff has
2 mild restrictions in all four functional areas. ECF No. 11 at 3–4 (citing AR 19–20,
3 245, 266–68, 447, 455, 459, 471, and 473).

4 At step two, an ALJ may find impairments or combinations of impairments to
5 be non-severe “if the evidence establishes a slight abnormality that has no more than
6 a minimal effect on an individual's ability to work.” *Webb v. Barnhart*, 433 F.3d
7 683, 686 (9th Cir. 2005); *see also* SSR 85-28, 1985 SSR LEXIS 19 at *8, 1985 WL
8 56856, at *3. An ALJ’s error at step two is not reversible if the ALJ resolves step
9 two in claimant’s favor and otherwise properly accounts for Plaintiff’s limitations.
10 *See Buck v. Berryhill*, 869 F.3d 1030, 1048–49 (9th Cir. 2017).

11 ALJ Crovella resolved step two in Plaintiff’s favor by finding that Plaintiff
12 has severe, medically determinable impairments in the form of acute myocardial
13 infarction, coronary artery disease, and obesity. AR 18–19. ALJ Crovella
14 memorialized that she considered Plaintiff’s hearing loss and mental impairments, as
15 well as other health issues. AR 19.

16 With respect to Plaintiff’s hearing loss, the ALJ first noted that Plaintiff had
17 not been treated with a cochlear implant. AR 19. The ALJ next cited a record from
18 April 19, 2018, in which Plaintiff had been diagnosed with “mild sensorineural
19 hearing loss, bilaterally” and noted that Plaintiff did not testify to any significant
20 limitations from hearing loss. AR 19.

1 In addition to stating that Plaintiff has only “mild” hearing loss, the record
2 cited by the ALJ contains the finding that “[c]ertainly [Plaintiff’s] hearing loss . . . is
3 not at all disabling.” AR 329. This is substantial evidence for the ALJ’s treatment
4 of Plaintiff’s hearing loss at step two. Moreover, Plaintiff cites to nothing for his
5 assertion that his hearing loss “would certainly impact his ability to communicate
6 over the phone or communicate in noisy surroundings” and does not carry his
7 burden of showing that his hearing loss has more than a minimal effect on his ability
8 to work. *See* SSR 85-28; ECF No. 13 at 3 (Plaintiff’s reply citing only to the same
9 April 2018 record cited by the ALJ and an Adult Function Report in which Plaintiff
10 reported having hearing damage requiring him to wear hearing aids, but not stating
11 any effect on his ability to work).

12 With respect to Plaintiff’s mental health impairments, the ALJ found Plaintiff
13 only mildly impaired in all four functional areas. AR 19–20. As the Commissioner
14 recites in her brief, the ALJ cited to evidence that Plaintiff was able to count change,
15 drive a car, and follow instructions and demonstrated normal (“ok”) memory and
16 normal judgment and insight in mental examination. AR 19, 455, 459, 471, and 473.
17 The ALJ also cited to a record from April 7, 2020, two years after the onset date, in
18 which Plaintiff reported belonging to snowmobile, motorcycle, and archery clubs
19 and presented as “open, friendly and cooperative.” AR 444–47. The ALJ further
20 cited to evidence supporting that Plaintiff is relatively capable of adapting and
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1 managing himself, including demonstrating a capacity to travel and drive long
2 distances in his camper trailer and manage his own care, chores, and finances. AR
3 20 (citing AR 263–70); *see also* AR 536 (Plaintiff reporting to a physician that he no
4 longer stressed out over daily events and was traveling to Alaska after previously
5 completing a three-week trip to get a side-by-side). Based on this substantial
6 evidence, the ALJ’s evaluation of Plaintiff’s mental impairments at step two was
7 reasonable. Even if the Court were to find error in the ALJ’s step two analysis,
8 Plaintiff has not shown that the error was harmful, in light of the ALJ’s
9 determination that Plaintiff has other severe impairments and the memorialization
10 that the ALJ considered all medically-determinable impairments, including those
11 that are not severe, in the remaining steps of the sequential analysis.

12 Accordingly, the Court finds no reversible error at step two and denies
13 judgment to Plaintiff on this ground.

14 ***Subjective Symptom Statements***

15 Plaintiff argues that, “if the Court finds that the ALJ failed to consider
16 [Plaintiff’s] hearing loss and mental health impairments as severe and remands this
17 case for further consideration, the claimant’s symptom statements will also need to
18 be re-examined, especially if the mental health conditions are found to be severe, as
19 that can impact the analysis of the claimant’s presentation and credibility.” ECF No.
20 9 at 12. In addition, Plaintiff asserts that the ALJ did not provide specific or rational
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1 explanations for finding Plaintiff's symptom statements not consistent with the
2 medical records. *Id.* at 12. Specifically, Plaintiff contends that the ALJ did not
3 explain how Plaintiff's complaint of being shaky and irritable prior to meals, and
4 feeling fatigued after eating, is undermined by a medical record showing a normal
5 physical examination when "[t]here is no indication that this examination was done
6 before or after a meal or was meant to test the irritability or lethargy of the
7 claimant[.]" *Id.* (citing AR 23). Plaintiff summarizes that, "[h]ad the ALJ found the
8 claimant's testimony to be consistent with the record the ALJ would not have been
9 able to find the claimant capable of employment based on his level of fatigue and
10 difficulty getting along with others." *Id.* at 13. Plaintiff adds, "had the ALJ given
11 claimant's testimony greater weight, the ALJ should have also included the rate at
12 which the claimant would be off-task and absent from work due to his impairments,
13 and would have included issues with open hostility in the workplace, and the ALJ
14 would not have been able to find claimant capable of performing even light level
15 work." *Id.* at 13–14. Lastly, Plaintiff contends that the ALJ failed to consider the
16 third-party function report of Plaintiff's girlfriend, which Plaintiff argues "would be
17 highly probative given part of the reason the ALJ found claimant's mental health
18 symptoms not severe is because of that [sic] relationship with his on and off again
19 girlfriend." *Id.*

1 The Commissioner responds that the ALJ was permitted to discount Plaintiff's
2 subjective complaints for being inconsistent with his activity level. ECF No. 11 at 7
3 (citing 20 C.F.R. § 404.1529(c)(3)(i)). The Commissioner cites to the evidence that
4 the ALJ cited supporting that Plaintiff lives and travels long distances in a camper
5 trailer, exercises, belongs to clubs, snowboards, rides motorcycles, and helps his
6 girlfriend with household tasks. *Id.* at 7–8 (citing AR 24, 56–59, 327, 447, 466, 468,
7 479, and 535). The Commissioner also argues that the ALJ reasonably determined
8 that the medical evidence did not substantiate Plaintiff's allegations and relied on
9 substantial evidence showing that Plaintiff's heart disease is stable and did not
10 require aggressive interventions during the relevant period. *Id.* at 8 (citing AR 22–
11 24, 338, 340–43, 347, 356, 386–87). The Commissioner submits that Plaintiff “fails
12 to show how the ALJ's decision lacked sufficient specificity.” *Id.* at 10. The
13 Commissioner further argues that any error with respect to the ALJ's treatment of
14 statements from Plaintiff's girlfriend was harmless because they “were substantially
15 the same” as Plaintiff's own discounted testimony. *Id.* at 11.

16 In deciding whether to accept a claimant's subjective pain or symptom
17 testimony, an ALJ must perform a two-step analysis. *Smolen v. Chater*, 80 F.3d
18 1273, 1281 (9th Cir. 1996). First, the ALJ must evaluate “whether the claimant has
19 presented objective medical evidence of an underlying impairment ‘which could
20 reasonably be expected to produce the pain or other symptoms alleged.’”
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1 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v.*
2 *Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). Second, if the first test is met and there
3 is no evidence of malingering, “the ALJ can reject the claimant’s testimony about
4 the severity of [his] symptoms only by offering specific, clear and convincing
5 reasons for doing so.” *Smolen*, 80 F.3d at 1281.

6 There is no allegation of malingering in this case. Plaintiff alleged the
7 following impairment, as summarized in the ALJ’s decision:

8 The claimant alleges disability because of heart disease, sleep apnea,
9 hypertension, depression, fatigue, impaired vision, and hearing loss. The claimant testified that he currently lives in a camper trailer. He testified that he had to stop working, due to his heart attacks and inability to cope with work stress. The claimant testified that his chest pain and fatigue worsen with exposure to sun and heat. The claimant testified that he can lift and/or carry about 20 to 30 pounds. He can stand for approximately 10 to 15 minutes at a time, and he can sit about 30 minutes. The claimant testified that he can walk for about thirty minutes in a grocery store if he uses a shopping cart for support. In a function report, he estimated that he can walk about 1000 feet. The claimant’s girlfriend reported that the claimant has difficulty with hearing, memory, task completion, concentration, and getting along with others. The claimant alleges problems with lifting, squatting, bending, standing, reaching, walking, sitting, kneeling, hearing, climbing, and seeing, as well as difficulty with memory, task completion, concentration, understanding, following instructions, and getting along with others.

17 AR 22 (citing AR 223, 239, 268, and 304–07).

18 The ALJ found that Plaintiff’s “testimony that he is unable to sustain work
19 activity is inconsistent with his self-reported daily activities, and medical history,
20 which support greater functional abilities.” AR 24. The ALJ cited to Plaintiff’s
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1 hearing testimony that he regularly runs errands, drives his camper on lengthy road
2 trips, socializes with friends, swims, and completes household chores. AR 60–64.
3 The ALJ also cites to medical records indicating that Plaintiff reported exercising on
4 a treadmill and with weights in April 2018 and reported belonging to snowmobile,
5 motorcycle, side-by-side, and archery clubs in 2020. AR 327, 436, 447, and 457.
6 The ALJ further cited a June 2020 mental health treatment record indicating that
7 Plaintiff reported that he repeatedly “perform[ed] Herculean jobs like mowing the
8 field” for his girlfriend. AR 468. These citations support that Plaintiff was not as
9 debilitated as he alleged. Whether or not the record could support a different
10 interpretation, the ALJ’s reasoning is supported by substantial evidence. *See*
11 *Hill v. Astrue*, 365 Fed. Appx. 808, 809 (9th Cir. 2010) (recognizing that courts must
12 defer to the Commissioner’s decision if evidence exists to support more than one
13 rational interpretation). Accordingly, the Court finds no error with respect to the
14 ALJ’s treatment of Plaintiff’s subjective symptom statements. As the report of
15 Plaintiff’s girlfriend is cumulative of Plaintiff’s own testimony, the Court further
16 finds no error in the ALJ’s treatment of that third-party statement. *See* AR 234–41.
17 The Court denies judgment to Plaintiff on this ground.

18 ***Medical Source Opinions***

19 Plaintiff argues that the ALJ failed to properly assess the medical opinions in
20 the record when the ALJ found the opinions of the state agency medical consultants
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1 more persuasive than several treating providers. ECF No. 9 at 16 (citing AR 24–26).
2 Although Plaintiff assigns error to the treatment of three treating sources’ opinions,
3 Plaintiff pursues her claim of error only with respect to David Krueger, M.D. on
4 reply. *See* ECF Nos. 9 at 18; 13 at 8; LCivR 7. Plaintiff argues that the Plaintiff’s
5 participation in certain physical activities does not undermine the validity of Dr.
6 Krueger’s opinion that Plaintiff would have significantly more limitations than what
7 the ALJ provided for in the RFC because Dr. Krueger was aware of these activities
8 when he formulated his opinion. ECF No. 13 at 7–8. Plaintiff asserts that as
9 Plaintiff’s longtime treating provider, Dr. Krueger is in a “much better position to
10 offer an opinion regarding [Plaintiff’s] limitations than state agency consultants who
11 are basing the entirety of their opinions on what was written down in the chart
12 notes.” *Id.*

13 The Commissioner asserts that the ALJ reasonably found Dr. Krueger’s
14 opinion unpersuasive based on its inconsistency with contemporaneous treatment
15 notes and because Dr. Krueger “made vague statements and recorded
16 inconsistencies.” ECF No. 11 at 14–15 (citing AR 25, 58–59, 60–61, 340, 344, 349–
17 50, 468, 541, 554, and 555).

18 The regulations that took effect on March 27, 2017, provide a new framework
19 for the ALJ’s consideration of medical opinion evidence, and require the ALJ to
20 articulate how persuasive she finds all medical opinions in the record, without any
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1 hierarchy of weight afforded to different medical sources. *See* Rules Regarding the
2 Evaluation of Medical Evidence, 82 Fed. Reg. 5844-01, 2017 WL 168819 (Jan. 18,
3 2017). Instead, for each source of a medical opinion, the ALJ must consider several
4 factors, including supportability, consistency, the source’s relationship with the
5 claimant, any specialization of the source, and other factors such as the source’s
6 familiarity with other evidence in the claim or an understanding of Social Security’s
7 disability program. 20 C.F.R. § 404.1520c(c)(1)-(5).

8 Supportability and consistency are the “most important” factors, and the ALJ
9 must articulate how she considered those factors in determining the persuasiveness
10 of each medical opinion or prior administrative medical finding. 20 C.F.R. §
11 404.1520c(b)(2). With respect to these two factors, the regulations provide that an
12 opinion is more persuasive in relation to how “relevant the objective medical
13 evidence and supporting explanations presented” and how “consistent” with
14 evidence from other sources the medical opinion is. 20 C.F.R. § 404.1520c(c)(1).
15 The ALJ may explain how she considered the other factors, but is not required to do
16 so, except in cases where two or more opinions are equally well-supported and
17 consistent with the record. 20 C.F.R. § 404.1520c(b)(2), (3). Courts also must
18 continue to consider whether the ALJ’s finding is supported by substantial evidence.
19 *See* 42 U.S.C. § 405(g) (“The findings of the Commissioner of Social Security as to
20 any fact, if supported by substantial evidence, shall be conclusive . . .”).
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1 Prior to revision of the regulations, the Ninth Circuit required an ALJ to
2 provide clear and convincing reasons to reject an uncontradicted treating or
3 examining physician's opinion and provide specific and legitimate reasons where the
4 record contains a contradictory opinion. *See Revels v. Berryhill*, 874 F.3d 648, 654
5 (9th Cir. 2017). However, the Ninth Circuit has held that the Social Security
6 regulations revised in March 2017 are "clearly irreconcilable with [past Ninth
7 Circuit] caselaw according to special deference to the opinions of treating and
8 examining physicians on account of their relationship with the claimant." *Woods v.*
9 *Kijakazi*, No. 21-35458, 2022 U.S. App. LEXIS 10977, at *14 (9th Cir. Apr. 22,
10 2022). The Ninth Circuit continued that the "requirement that ALJs provide
11 'specific and legitimate reasons' for rejecting a treating or examining doctor's
12 opinion, which stems from the special weight given to such opinions, is likewise
13 incompatible with the revised regulations." *Id.* at *15 (internal citation omitted).

14 Accordingly, as Plaintiff's claim was filed after the new regulations took
15 effect, the Court refers to the standard and considerations set forth by the revised
16 rules for evaluating medical evidence. *See* AR 16, 86.

17 Dr. Krueger completed a Medical Report Form for Plaintiff on May 28, 2021.
18 AR 554–55. Dr. Krueger indicated that he had first seen Plaintiff in 2016 and had
19 last seen Plaintiff on May 11, 2021. AR 554. Dr. Krueger opined that Plaintiff: (1)
20 can sit for more than two hours at a time; (2) can sit and can stand for a total amount
21

1 of two hours, each, in an eight-hour working day; (3) would not require a job that
2 permits shifting positions at will from sitting, standing, or walking; (4) would likely
3 miss approximately one day per month if working a full-time schedule; (5)
4 occasionally experiences symptoms severe enough to interfere with attention and
5 concentration needed to perform simple work tasks; (6) can frequently lift and carry
6 fewer than ten pounds, can occasionally carry ten or twenty pounds, and can rarely
7 carry fifty pounds in a competitive work situation; and (7) can perform low impact,
8 non-lifting/climbing, and mostly sedentary work. AR 554–55. Dr. Krueger further
9 circled one hour for the amount of time that Plaintiff can stand before needing to “sit
10 down, walk around, etc.,” but Dr. Krueger added a question mark next to his
11 selection. AR 554.

12 The ALJ found Dr. Krueger’s not persuasive to the extent that Dr. Krueger
13 “supported his assessments by referencing the claimant’s sleep apnea, fatigue,
14 permanent mild to moderate cardiac impairment, low ejection fraction, and dyspnea”
15 when “contemporaneous treatment notes are consistent with greater exertional
16 abilities.” AR 25. The ALJ cited records for the proposition that Plaintiff “has an
17 excellent exercise capacity for his age, and he reported that he is active and currently
18 losing weight.” AR 25 (citing AR 340, 344). The ALJ cited two treatment records to
19 show that Plaintiff told his treatment providers that he is able to snowmobile,
20 including pulling his machine out of the snow, and can mow a large lawn. AR 25
21

1 (citing AR 349, 468). In addition, the ALJ found Dr. Krueger’s opinion “less
2 persuasive” because of vague statements and inconsistencies. AR 25. The ALJ
3 notes “Dr. Krueger’s uncertainty regarding the claimant’s functioning, as he places a
4 question mark next to how long the claimant can stand at one time” and “also
5 indicates uncertainty regarding the length of unscheduled breaks that the claimant
6 would require.” AR 25. The ALJ continues that “[t]he opinion is internally
7 inconsistent, as Dr. Krueger states that the claimant can sit more than two hours at
8 one time, but he also states that the claimant can only sit about two hours, total, in a
9 workday.” AR 25. Furthermore, the ALJ observes that although Dr. Krueger opines
10 that Plaintiff “can perform a ‘mostly sedentary’ job,” Dr. Krueger “also states that he
11 can lift and carry 20 pounds occasionally.” The ALJ cites to a treatment record
12 “consistent with a greater lifting and/or carrying ability, as the claimant even told
13 another physician that he could lift up to 50 pounds at a time, or lesser weights more
14 frequently.” AR 25 (citing AR 541).

15 The records cited by the ALJ indeed indicate that Plaintiff has “excellent
16 exercise capacity,” and reported to Dr. Krueger in 2019 that, despite frustrations
17 with his lack of endurance, he was doing a lot of exercise, including an instance
18 where “he had to horse around on his snowmobile and pull the sled out of the snow
19 [and afterward] was a little sore in the chest.” AR 340, 344, and 349. Furthermore,

1 Dr. Krueger's opinion itself provides substantial evidence for the ALJ's reasoning
2 that the opinion is internally inconsistent. *See* AR 554–55.

3 Plaintiff's argument that Dr. Krueger was aware of Plaintiff's activities does
4 not demonstrate that Dr. Krueger's opinion was supported or that the ALJ erred in
5 her analysis. *See* ECF No. 13 at 7–8 (“The ALJ pulled these notes regarding the
6 claimant's activities directly from Dr. Kruegar's notes, indicating that the treating
7 provider knew about these activities, and still believed that claimant would have
8 significantly more limitations than what the ALJ provided for in the RFC.”). Rather,
9 the ALJ cited to evidence to support her determination that Dr. Krueger's opinion
10 was unsupported by the medical record and was internally inconsistent. The ALJ
11 properly considered the most important factors, supportability and consistency, in
12 finding Dr. Krueger's opinion “less persuasive.” AR 25.

13 ***Step Five***

14 Plaintiff contends that the ALJ erred at step five because the VE testified in
15 response to a hypothetical that was incomplete due to the ALJ's allegedly improper
16 consideration of Plaintiff's subjective symptom testimony and the medical opinion
17 evidence. ECF No. 13 at 8. The ALJ's hypothetical must be based on medical
18 assumptions supported by substantial evidence in the record that reflect all of a
19 claimant's limitations. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001).
20 The ALJ is not bound to accept as true the restrictions presented in a hypothetical
21

1 question propounded by a claimant's counsel. *Osenbrock*, 240 F.3d at 1164. The
2 ALJ may accept or reject these restrictions if they are supported by substantial
3 evidence, even when there is conflicting medical evidence. *Magallanes v. Bowen*,
4 881 F.2d 747, 756 (9th Cir. 1989).

5 Plaintiff's argument assumes that the ALJ erred in his treatment of Plaintiff's
6 subjective symptom testimony and the medical source testimony and in formulating
7 the RFC. As discussed above, the ALJ's assessment of this evidence was not
8 erroneous. Therefore, the RFC and hypothetical contained the limitations that the
9 ALJ found credible and supported by substantial evidence in the record. The ALJ's
10 reliance on testimony that the VE gave in response to the hypothetical was proper.
11 *See Bayliss v. Barnhart*, 427 F.3d 1211, 1217–18 (9th Cir. 2005). The Court grants
12 judgment to the Commissioner on this final ground.

13 Having reviewed the record and the ALJ's findings, this Court concludes that
14 the ALJ's decision is supported by substantial evidence and free of harmful legal
15 error. Accordingly, **IT IS HEREBY ORDERED** that:

- 16 1. Plaintiff's Opening Brief, **ECF No. 9**, is **DENIED**.
- 17 2. Defendant the Commissioner's Brief, **ECF No. 11**, is **GRANTED**.
- 18 4. Judgment shall be entered for Defendant.

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order, enter judgment as directed, provide copies to counsel, and **close the file** in this case.

DATED November 3, 2023.

s/ Rosanna Malouf Peterson
 ROSANNA MALOUF PETERSON
 Senior United States District Judge